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commission control.¹² A municipality has no governmental power outside of its own limits. It could not grant a franchise to a private company to serve another city, and it is hard to see why a city performing such service itself should not be amenable to state supervision.¹³ The holding to the contrary places the inhabitants of the outside city in an unenviable situation. They have no voice as voters or taxpayers in the shaping of the affairs of the municipality engaged in the business, and to deny the power of the commission to intervene is apparently to leave these consumers and indeed any private company in the field also, at the mercy of the other city. What possible objection there is to state control over this field of public service is not apparent. Granting that the constitution prevents the commission from exercising the power, it would seem then, to follow that there is need for an amendment conferring upon the commission jurisdiction over utilities owned by municipalities, at least in their service outside their own borders.

H. A. B.

SALES: ARCHAISM OF PRESENT RULE GOVERNING FORECLOSURE OF VENDOR'S LIEN—In *Madison v. Weyl-Zuckerman and Com-*

¹² Colorado, where local service of a public utility within a municipality is exempt from commission control, City and County of Denver v. Mountain States, etc. Co. (1919) 184 Pac. 604, P. U. R. 1920A 238, treats a municipal plant operating outside the city as any other public utility and subject to the regulation of the commission. Star Investment Co. v. City and County of Denver, P. U. R. 1920B 684.

In Arizona, where the constitution provides that corporations other than municipal are subject to the commission's control, the intramunicipal business of a city-owned plant is exempt. Re South Side Gas and Electric Co., P. U. R. 1918A 493. However, a municipal plant serving an adjoining city is within the commission's jurisdiction, as it then operates as a private company. Harber v. Phoenix, P. U. R. 1918D 352, holding that the constitutional exemption of municipal corporations applied only to cities within their own limits. It is true that these are merely holdings of the commissions, but they have never been overturned and represent the practice and statutory interpretation in those states. This was also the view in California prior to the principal case. See In re Application of San Diego (1914) 4 Cal. R. Com. Dec. 902, also the holding of the Railroad Commission in granting the order that was annulled by the case under discussion, *sub nom.* Pacific Light etc. Co. v. City of Pasadena, P. U. R. 1920A 149. In New Jersey also the approval of the commission is required to enable a municipality to serve adjoining cities. In re Borough of South River, P. U. R. 1920E 408.

¹³ The state constitution under § 19 of Art. XI authorizes a municipal utility to serve outside its borders. This section as it formerly read gave municipalities the right to fix rates within their own limits for public utilities operating therein. It was held in the South Pasadena case, *supra*, n. 6, that the power of the city being served was paramount to that of the other municipality engaged in the public service. The rate regulating powers of municipal corporations over "public utilities" were taken away in 1914, when Art. XII, § 23 was amended. The principal case says by way of dictum that municipal corporations were not supposed to be embraced in the term "public utility", admitting that it is not clear which one of the two cities has the right to fix rates for outside service. It is submitted that the Railroad Commission is the logical agency for that purpose.

pany,¹ plaintiff, a seller of personal property, after the buyer's repudiation, sold the property at a private sale and sued for the balance of the purchase price. Held, that he was not entitled to such a sum and that because title had passed, he had converted the buyer's property. The conversion was accomplished because the seller failed to follow sections 3049 and 3005 of the Civil Code, which require a sale at public auction preceded by notice in the manner prescribed for the sale of pledges.²

These sections are archaic for several reasons. In the first place, only a lawyer can tell whether title has actually passed in the ordinary contract of sale, and it generally requires litigation to determine whether that phenomenon has occurred.³ If title has not passed, and the buyer has broken his contract, a private resale will not affect the seller's rights particularly. If it has, the seller finds himself in the situation noted above. A more practical rule would require the same procedure in each case.

The sections are archaic, however, for another and a more important reason. It is evident that a public resale preceded by notice was designed to protect the buyer. That protection is not afforded if the seller, by another method of pleading, can obtain practically the same relief as that denied in the principal case. Assume a similar situation. A agrees to sell some potatoes for \$1000. The bargain is struck, title passes, but B, the buyer, refuses to perform, principally because the potato market has collapsed. A then sells the potatoes at a private resale and obtains by such a sale the best price under the circumstances, say \$500. Note that A up to this time has only received \$500 for his \$1000 contract and that B should be forced to pay the balance. What ought A to do? If he sues for the remaining \$500 directly he will be met with the rule in the Madison case. Can he still sue for the entire purchase price, \$1000? It seems apparent that he ought to be allowed to do so, unless his conversion of the potatoes has in effect amounted to a rescission of the contract. But the Supreme Court in denying a motion for a rehearing of the Madison case expressly disaffirmed a finding that the contract of sale of necessity no longer existed because of the private resale.⁴ This is undoubtedly sound. Indeed, to be heard in conversion at all B, the buyer, must rely upon the contract which gave him title and the right to possession. He cannot therefore deny his duty to pay the purchase price.⁵ Further-

¹ (June 25, 1920) 32 Cal. App. Dec. 662, 192 Pac. 110.

² *Lowe v. Ozmun* (1906) 3 Cal. App. 387, 86 Pac. 729; *Bennet v. Potter* (1911) 16 Cal. App. 183, 166 Pac. 681.

³ Paraphrasing Professor Williston who speaks of the matter in a slightly different connection. See Williston on Sales, § 555.

⁴ (August 24, 1920) 60 Cal. Dec. 243, 192 Pac. 110.

⁵ In *Bennet v. Potter*, *supra*, n. 2, the seller alleged that he held the article sold subject to the buyer's order and demanded the purchase price. In fact he had resold the article at a private sale. The court held that if the buyer was required to pay the purchase price, she had a right to rely on the seller's allegation that he was willing to perform the contract. The seller made an obvious error in his pleading.

more, A's right to the purchase price accrued by reason of A's tender of performance before the conversion took place.⁶ If this is so, A should claim the entire purchase price, \$1000, from B. B's only defense will be the conversion for which he will be entitled to counterclaim. Under the usual California rule, his measure of damages will be the highest value of the potatoes between the date of the conversion and the time a judgment is rendered on that issue.⁷ How is it possible for B to prove that his potatoes were worth more than the price A received for them at the private resale, if we understand all the while that A's private resale was a fair one and obtained the best price possible on a fallen market? If he cannot prove that the highest value of the potatoes was more than \$500 between the date of the resale and the approximate time of the suit,⁸ it follows that A will be entitled to \$1000 minus \$500, which leaves \$500. Note that this is exactly the sum A realized he was entitled to in the first place and note, too, the remarkable result reached: A, entitled to \$500, sues for \$500 directly and fails (the Madison case); A, entitled to \$500 (he has already obtained \$500 from the resale) sues for \$1000 and recovers the \$500.⁹

The absurdity of this result is apparent and indicates the need for change. The rule set forth in the Uniform Sales Act¹⁰ is simple, clear, unambiguous. The unpaid seller, title having

⁶ It is to be noted that if a pledgee converts the property pledged with him, the debt is not thereby extinguished. In *Lowe v. Ozmun*, supra, n. 2, the pledgee was allowed to offset the amount of the debt in an action for conversion against him. In that case the value of the articles exceeded the value of the debt. A fortiori, had the debt exceeded the value of the pledge, the parties would be reversed, and it would have been the pledgor counterclaiming in conversion. For a note on wrongful sale in general by a pledgee, see 2 California Law Review, 70.

⁷ Cal. Civ. Code, § 3336.

⁸ For the situation when the market rises see *infra*, n. 9.

⁹ Even in the case where the market rises after the buyer's breach, if it were not for the California rule making the measure of damages in conversion the highest value of the property between the conversion and the date a verdict is rendered therein, it would make no difference, in the final settlement of the relations between the seller and the buyer, whether the resale was private or public. If, for example, the buyer elected to treat his damages as the value of the article at the date of the conversion, which he can do, of course, under the code section, supra n. 7, it is evident that the resale price would be the amount he would sue for. Just as the pledgee in the *Lowe* case, supra, n. 2, could set off the amount of his debt, so too the seller could set off the amount of the purchase price. This would leave a balance which, even had the sale been public, the seller would have been forced to pay anyway. If, however, the market continues to rise and a greater sum than the private resale price becomes the measure of damages, it is evident that the same result would not follow. The seller would then have to pay a larger amount than would be due the buyer after a public sale. Under the prevailing rule, therefore, when the seller resells privately on a rising market, it behooves him to try the issue as to the passage of title as expeditiously as possible so as to fix his liability as a converter, if he is to become one, and thus make the buyer's measure of damages correspond as nearly as possible to the private resale price.

¹⁰ Uniform Sales Act, § 60.

passed, after the buyer's default has lasted an unreasonable time, is allowed to sell again without formalities, and without notice to the buyer, provided that he exercises reasonable care and judgment in such a sale. Notice to the defaulting buyer is only material on the question as to whether the buyer has in fact been in default an unreasonable time. This procedure is more in accord with mercantile convenience requiring summary methods in dealing with goods than the California rule demanding statutory formalities, especially in view of the pitfalls the latter rule affords for both the business and legal profession.

H. B. S.

VENDOR AND PURCHASER: RISK OF DEPRECIATION IN VALUE OF LAND ON PURCHASER—Suppose a flood washes away four out of ten acres after a buyer goes into possession under an executory contract of sale. May the seller get specific performance despite the destruction of part of the *res*? No, says *Cooper v. Huntington*,¹ the risk of loss is on the vendor who has legal title, citing with approval an analogous case² where a purchaser in possession recovered the entire price already paid when fire destroyed part of the premises before a conveyance was to be made. Accordingly it has been considered well established in California that (irrespective of possession) risk of loss follows legal title,³ the Supreme Court having long repudiated the contrary rule established by the English Court of Chancery and frequently followed in America.⁴

Would it make any difference if a flood in the vicinity of the premises merely caused a depreciation in the value of the *res* without the destruction of any part of it?⁵ Should the risk of loss in this case also rest on the vendor? In *McCarty v. Wilson*,⁶

¹ (1918) 178 Cal. 160, 172 Pac. 591; 8 California Law Review, 195.

² *Thompson v. Gould* (1838) 37 Mass. (20 Pick.) 134. The latest Massachusetts case follows the rule: *Libman v. Levenson* (June 28, 1920) 128 N. E. 13.

³ Vendor in possession: *Smith v. Phoenix Insurance Company* (1891) 91 Cal. 323, 27 Pac. 738, 25 Am. St. Rep. 191, 13 L. R. A. 475; *Conlin v. Osborn* (1911) 161 Cal. 659, 120 Pac. 755.

Purchaser in possession: *Wong Ah Sure v. Ty Fook* (1918) 37 Cal. App. 465, 174 Pac. 64; *Cooper v. Huntington*, *supra*, n. 1; *La Chance v. Brown* (1919) 28 Cal. App. Dec. 1350, 183 Pac. 216, *Orrin K. McMurray* in 7 California Law Review, 454.

Vendor in possession of leasehold, title to which had passed to purchaser, loss fell on purchaser: *Potts Drug Co. v. Benedict* (1909) 156 Cal. 322, 104 Pac. 432.

Personal property, accord: *Kirtley v. Perham* (1917) 176 Cal. 333, 168 Pac. 351; *Waltz v. Silveira* (1914) 25 Cal. App. 717, 145 Pac. 169.

See generally: 8 California Law Review, 194.

⁴ *Idem*.

⁵ This situation is suggested by the following language: "the value of said premises depreciated to the extent of \$50 per acre . . . by reason of a change in the course of the San Gabriel River in the vicinity of said premises at the time of the great flood of February 1914." *McCarty v. Wilson* (1919) 30 Cal. App. Dec. 106, 110.

⁶ (October 20, 1920) 60 Cal. Dec. 491, 494, 193 Pac. 578, reversing 30 Cal. App. Dec. 106.